

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KATIE SIMMONS

Claimant

VS.

HERITAGE NURSING HOME

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 150,084

ORDER

Respondent appeals from an Award dated August 2, 1994 by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

Claimant appeared by her attorney, David L. McLane of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Timothy D. Clover of Chanute, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has reviewed and considered the record listed in the Award. The Board has adopted the stipulations listed in the Award.

ISSUES

After taking the stipulations the issues that remained for decision by the Administrative Law Judge (ALJ) were:

- (1) Nature and extent of claimant's disability; and

- (2) Whether claimant was entitled to additional temporary total disability compensation.

The ALJ found that claimant was temporarily totally disabled through July 27, 1992. Neither party appeals that finding. The ALJ found that claimant has a 60 percent work disability. Respondent appeals this finding. Claimant also asserts that the ALJ overlooked an issue, namely reimbursement for medical mileage. Claimant asks the Appeals Board to award reimbursement for medical mileage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Board finds and concludes:

- (1) Claimant sustained a 20 percent permanent partial impairment of function but has failed to meet her burden of establishing the nature and extent of any work disability. Accordingly, the Award should be limited to 20 percent permanent partial general disability.

Claimant was injured on August 18, 1990 while attempting to assist a resident at respondent's nursing home. She seeks benefits for both low back and cervical injury. Respondent agrees claimant suffered a low back injury but disputes the claim for cervical injury. The ALJ found that claimant did suffer both cervical and low back injury as a result of her work-related accident.

The Board disagrees with the ALJ's conclusion that claimant suffered a neck injury at work. Claimant gives inconsistent testimony regarding the onset of her neck symptoms. The medical records of Dr. James Armstrong also directly contradict claimant's version of the events. Claimant testified at preliminary hearing that her neck started hurting a week to ten days following the accident. At the regular hearing she gave specific testimony suggesting a rather severe onset of neck pain on the day of the accident.

Although the accident occurred August 18, 1990, neck complaints do not appear in the medical records until early 1991. Prior to that time both Drs. Hall and Armstrong had seen claimant on numerous occasions. The records of both doctors were introduced. Neither show neck complaints prior to January 1991. The first reference to neck injury is found in Dr. Armstrong's records of January 1991. His records state that claimant fell on wet stairs. The records specifically state she had a "sit down" type of fall. According to Dr. Armstrong's records she started having neck pain about two to three days after the fall.

In contrast, claimant states she does not know why there is no reference to neck complaints in either Dr. Hall's or Dr. Armstrong's records. She claims she did advise them of the neck problems. As to the incident described in Dr. Armstrong's records in January of 1991, claimant states she does not know why Dr. Armstrong would have referred to a fall down stairs. She explains that it may have come from the fact that he advised her not to fall and she, in turn, advised him that the only place she might fall would be down stairs at home. In context with the record as a whole, the Board finds claimant's explanation unconvincing, especially in contrast to specific information in Dr. Armstrong's records. The Board, therefore, finds and concludes that the claimant did not sustain a neck injury as a result of her on-the-job injury in August of 1990.

The record includes testimony from vocational experts, specifically Karen Terrill and Michael Kevin Lala. Both give opinions regarding loss of ability to earn a comparable wage and loss of ability to obtain and retain work in the open labor market. However, in each case the opinions include restrictions which relate to claimant's neck complaints. The record does not show a reasonable basis for assessing work disability based solely on the

low back injury. Claimant has, therefore, failed to meet her burden of establishing what work disability, if any, resulted from the low back injury alone.

The record includes several functional impairment ratings, including several which are limited to the low back injury. Both Dr. Hish S. Majzoub and Dr. Vito Carabetta rate the low back and neck separately. Dr. Majzoub concluded claimant's low back injury was, at most, a muscular or ligamentous type injury which resulted in a 1-2 percent disability to the body as a whole. Dr. Carabetta, on the other hand, rated claimant's injury to her low back as a 10 percent impairment to the body as a whole. The Board finds that both the ratings understate claimant's low back injury. As a result of the injury claimant underwent a right-sided hemilaminectomy and discectomy at L5-S1 for a herniated nucleus pulposus. Subsequent physical therapy yielded only minimal improvement and claimant continued to have stabbing pain in the left buttocks with the tingling and numbness in the left thigh and left calf. Dr. Edward Prostic's report of May 14, 1991, completed from an examination prior to claimant's surgery, concluded claimant remained temporarily totally disabled. He anticipated a permanent partial rating would be approximately 20 percent to the body as a whole. In Dr. Prostic's deposition of February 18, 1993 he testified that, in his opinion, her functional impairment rating for the low back injury alone remained unchanged following additional treatment. Based on the nature and extent of the residual post-surgery complaints, the Board agrees and finds that claimant sustained a 20 percent permanent partial impairment of function to the body as a whole due to the low back injury. As claimant has failed to sustain her burden of establishing nature and extent of work disability, the Award will be based on the functional impairment and the Board finds and concludes claimant has a 20 percent permanent partial general body disability.

(2) At oral argument the parties agreed that the ALJ had overlooked the medical mileage and stipulated that claimant should be paid medical mileage in the amount of \$809.64.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated August 2, 1994, should be, and is hereby, modified:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Katie Simmons, and against the respondent, Heritage Nursing Home, and its insurance carrier, Hartford Accident & Indemnity Company, for an accidental injury which occurred August 18, 1990, and based upon an average weekly wage of \$176.00, for 101.43 weeks of temporary total disability compensation at the rate of \$117.34 per week or \$11,901.80, followed by 313.57 weeks at the rate of \$23.47 per week or \$7,359.49 for a 20% permanent partial general body impairment of function, making a total award of \$19,261.29.

As of March 8, 1996, there is due and owing claimant 101.43 weeks of temporary total disability compensation at the rate of \$117.34 per week or \$11,901.80, followed by 188.43 weeks of permanent partial disability compensation at the rate of \$23.47 per week in the sum of \$4,422.45, for a total of \$16,324.25 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,937.04 is to be paid for 125.14 weeks at the rate of \$23.47 per week, until fully paid or further order of the Director.

Claimant should be paid medical mileage in the amount of eight hundred nine dollars and sixty-four cents (\$809.64).

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne by the respondent and none by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Debra D. Oakleaf Transcript of Preliminary Hearing	\$102.60
Shaun J. Higgins Transcript of Regular Hearing	\$179.80
Hostetler & Associates Deposition of Edward J. Prostic, M.D.	\$210.20
Martha B. Fowks Deposition of Hish S. Majzoub, M.D.	\$117.60
Metropolitan Court Reporters Deposition of Vito Carabetta, M.D.	\$278.60
Martin D. Delmont Deposition of Michael K. Lala	\$204.90
Deposition of Karen Terrill	\$173.85

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Timothy D. Clover, Chanute, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director